IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

S.T.Rev.No.313 of 2005

T.A.NO.19/2005 OF THE KERALA SALES-TAX APPELLATE TRIBUNAL, THIRUVANANTHAPURAM.

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REVISION PETITIONER:-

M/S. RAJAN JEWELLERY, THIRUVALLA,
REPRESENTED BY MANAGING PARTNER
G. PRADEEPKUMAR.

BY ADV. SRI.ARIKKAT VIJAYAN MENON
SRI.HARISANKAR V. MENON
SMT.MEERA V.MENON

RESPONDENT:-

STATE OF KERALA.

BY SPECIAL GOVERNMENT PLEADER (TAXES) SRI.V.V.ASHOKAN.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 01/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

H.L.Dattu,C.J. & K.T.Sankaran,J.

S.T.Rev. No. 313 of 2005

Dated, this the 1st day of June, 2007

ORDER

H.L.Dattu,C.J.

The petitioner is a partnership firm engaged in the business of running a jewellery shop. The assessee is registered both under the provisions of the Kerala General Sales Tax Act, 1963 ("KGST Act" for short) and the Central Sales Tax Act, 1956 ("CST Act" for short), and is borne on the files of the Assistant Commissioner (Assessment)-II, Special Circle-III, Pathanamthitta.

2. The assessing authority, for the assessment year 1997-98, had completed the assessment proceedings by its order dated 14.01.1999. Aggrieved by the said order, the assessee had filed a first appeal in S.T.A.No.517 of 1998 before the Deputy Commissioner (Appeals), Kollam. The said authority by its order dated 30.11.1999 had allowed the appeal in part. The petitioner, not being satisfied with the order so passed, had carried the matter by way of second appeal before the Kerala Sales Tax Appellate Tribunal, Thiruvananthapuram in T.A.No.280 of 2000. The Tribunal, by its order dated 20.04.2002, has allowed the appeal. In order to resolve the controversy between the parties to the lis, it would be appropriate at this stage itself to refer to the orders passed by the Tribunal. The same is as under:

> "The next issue is regarding the estimated addition consequent on the rejection of accounts by the assessing authority. We find that the only defect pointed out is the non-disclosure of the corresponding purchase turnover of 6252.500 gms. of gold declared under VDIS before the Income tax Department and brought to accounts for sales during the year. We have already

held that the amount declared is the value of own gold and hence any purchase tax is not assessable. In the circumstances the defect pointed out is not existing. Since no other defects have been pointed out by the assessing authority there is no valid ground for rejection of books of accounts. Hence the 10% addition and the corresponding estimate of purchase turnover at 70% is not sustainable. We therefore order to delete these additions also.

In the result the assessing authority is directed to accept the accounts. The second appeal is allowed".

3. Pursuant to the direction issued by the Tribunal, the assessing authority has passed a fresh assessment order dated 26.12.2002.

4. The revisional authority, being of the opinion that the order passed by the assessing authority dated 26.12.2002 is irregular, improper and prejudicial to the interest of the Revenue, has issued a notice under Section 35 of the KGST Act dated 2.8.2004, *inter alia* directing the assessee to show cause why the orders of assessment passed by the assessing authority dated 26.12.2002 should not be revised. The notice issued by the revisional authority reads as under:

"Notice under Section 35 of the KGST Act '63

Sub: KGST Act - 1963 - Proposal for Suo-Moto Revision M/s.Rajan Jewellery, Thiruvalla - Assmt. for the year 97-98 - Imposition of penalty not included in the Assmt. Reg:-

Ref: Assmt. Order No.14020055/97-98 dtd:20..4..2004.

.....

Please take notice that the final Assessment for the year 97-98 was completed on 14.1.99 fixing a taxable turnover at Rs.13530680/-. This assessment was revised on 26.12.2002 as per the findings of the Salestax Appellate Tribunal subsequently a crimefile was received from the Intelligence Officer, Pathanamthitta, imposition of penalty for Rs.68123/- on the dealer for the non-maintenance of correct

and complete accounts as stipulated u/s.27 of the KGST Act 1963. The suppression which was detected Rs.851874/- and the tax due there on for Rs.59631/- was not considered the original assmt. or in the revised assessment.

In the above circumstances the assessment already completed for the year 97-98 is irregular, improper and prejudicial to revenue. Hence it is proposed to cancel the assessment for the year 97-98 invoking the powers conferred u/s.35 of the KGST Act - 1963 and remit back to the assessing Authority for the purpose of fresh disposal.

Your objection if any to the proposal may be filed within 7 days of receipt of this notice, failing which the proposal will be confirmed without further notice. You are also given an opportunity of being heard in my office at 11 AM on 13..8..04".

5. After receipt of the said show cause notice, the assessee has filed its detailed reply by reply letter dated 30.08.2004. In that, it was specifically contended that the notice so issued is beyond the time prescribed under Section 35 of the Act and further requested the revisional authority to drop the proposed proceedings. The reply of the petitioner is as under:

"The Deputy Commissioner
Commercial Tax Office
Pathanamthitta

Sub: Assessment to Sales Tax 1997-98 - Suo Moto Revision.

Ref: 1. Notice under section 35 of the KGST Act No.A2.1111/04 dated 2.08.04.

2. Our letter dated 09.08.2004.

Sir,

In connection with the above, the following facts are brought to your kind notice.

The assessment to sales tax for the year 1997-98 was

> completed on 14.01.1999. The revised assessment dated 26.12.02 was only to implement modification allowed by the Tribunal. The escape of turnover is only related to the assessment dated 14.01.1999. The time allowed to invoke section 35 is four years as section 35(2)(c), In this case four years have been over by 14.01.2003.
>
> In view of the above facts, it is submitted that the proposal to invoke section 35 make kindly be dropped.
>
> If for any reason the above objections are found not accepted we may be given an opportunity for hearing".

6. After receipt of the reply, the revisional authority has proceeded to pass an order dated 20.12.2004 revising the orders passed by the assessing authority dated 26.12.2002. Aggrieved by the same, the assessee was before the Kerala Sales-tax Appellate Tribunal, Thiruvananthapuram in T.A.No.19/2005. The Tribunal by its order dated 11.04.2005 has rejected the appeal.

7. The assessee, being aggrieved by the aforesaid order, is before us in this Sales Tax Revision Petition. The assessee has framed the following questions of law for our consideration and decision. They are as under:

> "(A) Whether on the facts and in the circumstances of the case has not the Appellate Tribunal gone wrong in upholding Annexure-G revisional order?
>
> (B) Is not the finding of the Appellate Tribunal that the limitation period of four years has to be taken from the date of Annexure-D revised order of assessment dtd.26-12/2002, illegal in view of section 35(2A)?"

8. The learned counsel appearing for the revision petitioner

would submit that the notice issued by the revisional authority under Section 35 of the Act is beyond the time limit prescribed under Section 35(2) of the Act. According to the learned counsel, if for any reason the revising authority was inclined to revise the orders passed by the assessing authority, he could have done it on or before 13.01.2003 or in the alternative, at least on or before 19.04.2003. Therefore, it is stated that the notice issued by the revising authority and the orders passed pursuant thereto are beyond the period of limitation prescribed and, therefore, the same is unsustainable in law.

9. Per contra, Sri.V.V.Ashokan, learned counsel appearing for the Revenue would submit that what was sought to be revised by the revising authority is the order of fresh assessment passed by the assessing authority dated 26.12.2002 and, therefore, the revising authority was justified in issuing the notice for *suo motu* revision on 2.8.2004. Apart from this, he would submit that the notice issued is within the period of limitation prescribed in Section 35 (2) of the Act.

10. In order to answer the contentions raised by counsel appearing for the parties to the lis, the provisions of Section 35 of the KGST Act requires to be noticed and, therefore, they are extracted and the same read as under:

> **"35.- Powers of revision of the Deputy Commissioner suo motu:-** (1) The Deputy Commissioner may, of his own motion, call for and examine any order passed or proceedings recorded under this Act by any officer or authority subordinate to him other than an Appellate Assistant Commissioner which in his opinion is prejudicial to revenue and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not pass any order under sub-section (1) if,-

(a) the time for appeal against the order has not expired;

(b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court; or

(c) more than four years have expired after the passing of the order referred to therein.

(2A) Notwithstanding anything contained in sub-section (2), the Deputy Commissioner may pass an order under sub-section (1) on any point which has not been decided in an appeal or revision referred to in Clause (b) of sub-section (2), before the expiry of a periof od one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in Clause (c) of the sub-section, whichever is later.

(3) No order under this Section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard".

11. Section 35 of the Act provides the power of *suo motu* revision to the Deputy Commissioner of Commercial Taxes. Sub-section (1) of Section 35 of the Act envisages that the Deputy Commissioner may, on his own motion, call for and examine any order passed or proceedings recorded under the Act by an officer or authority subordinate to him other than the Appellate Assistant Commissioner which in his opinion is prejudicial to the interest of the Revenue and thereafter may pass appropriate orders as he thinks fit.

12. For exercising the powers under sub-section (1) of Section 35 of the Act, certain conditions are envisaged under sub-section (2) of Section 35 of the Act. The Deputy Commissioner is prohibited from passing any order

under sub-section (1) of Section 35 of the Act if the time limit for an appeal against the orders sought to be revised has not expired or the order sought to be revised has been made the subject matter of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal or of a revision in the High Court and, lastly, if more than four years have elapsed after the passing of the orders referred to therein.

13. Sub-section (2A) of Section 35 of the Act is substituted by Act 21 of 1978 with effect from 1.4.1978. The said sub-section starts with a *non obstante* clause. The said sub-section has been introduced by the Legislature for the benefit of the Revenue. The said sub-section provides that the Deputy Commissioner may *suo motu* initiate proceedings for revision on any point which has not been decided in an appeal or revision which is referred to in Clause (b) of sub-section (2) of Section 35 of the Act before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in Clause (c) of sub-section (2) of Section 35 of the Act.

14. Sub-section (3) of Section 35 of the Act mandates that the revisional authority shall not pass any orders under Section 35 of the Act without affording an opportunity of hearing to the assessee/affected person.

15. Having noticed the possible construction that could be placed on Section 35 of the Act and in particular sub-section (2) of Section 35 of the Act, let us get back to the facts in the instant case. The assessee, for the assessment year 1997-98, had filed its annual return. At the time of the assessment proceedings, the assessee had produced the books of accounts in

support of the annual returns filed for the said assessment year. Rejecting the books of accounts so filed, the assessing authority had completed the assessment proceedings by its order dated 14.1.1999. The said order was the subject matter of appeal before the first appellate authority who, by its order dated 30.11.1999, had modified the orders passed by the assessing authority. The assessee had carried the matter by way of second appeal before the Tribunal. The Tribunal while allowing the appeal has specifically directed the assessing authority to accept the books of accounts of the assessee and pass an appropriate orders for the assessment year 1997-98.

16. In view of the orders passed by the Tribunal, the assessing authority, by accepting the books of accounts produced by the assessee, passed a fresh assessment order on 26.12.2002.

17. After completion of the aforesaid assessment proceedings, the revisional authority has received a crime file relating to the assessee from the Intelligence Officer of the Department, wherein, certain penalty proceedings had been initiated against the assessee for non-maintenance of correct books of accounts and an order had been passed under Section 27 of the Act. Taking clue from the files of the Intelligence Officer, Pathanamthitta, the revising authority had proceeded to issue a notice under Section 35 of the Act to revise the orders of assessment passed by the assessing authority dated 26.12.2002. That only means that what is sought to be revised by the revising authority is an order of assessment passed on 26.12.2002 pursuant to the orders passed by the Tribunal on 20.04.2002. In the instant case, the revising authority is not revising the original order of assessment dated 14.1.1999 which has already

been set aside by the Tribunal by orders dated 20.4.2002. Now the question that arises for consideration is whether the initiation of the proceedings by the revising authority is within the time prescribed under the Act?

18. Under Section 35(2) of the Act, the Deputy Commissioner is not expected to revise an order under Section 35(1) of the Act if the time limit for the filing of the appeal against the order has not expired or the order proposed to be revised has been the subject matter of an appeal or a revision before a superior forum. The third condition that is envisaged under Clause (c) of sub-section (2) of Section 35 of the Act only says that the revisional authority cannot invoke its revisional power to revise an order if more than four years have elapsed after the passing of the order sought to be revised. In the instant case, as we have already indicated, the revisional authority has initiated proceedings to revise an order passed by the assessing authority dated 26.12.2002 and not the order dated 14.1.1999, since that order has merged with the order passed by the Tribunal dated 20.4.2002. In the instant case, notice has been issued by the revisional authority on 2.8.2004 and, therefore, it is within the time limit prescribed under Section 35(2) of the Act. In that view of the matter, the contention canvassed for the assessee cannot be accepted by us. Keeping in view all these aspects of the matter, the Tribunal, in our opinion, has rightly rejected the appeal filed by the assessee.

In view of the above, the questions of law framed by the assessee requires to be answered in the negative and in favour of the Revenue. Accordingly, the revision petition requires to be rejected and it is

rejected. In the facts and circumstances of the case, the parties are directed to bear own costs. Ordered accordingly.

Consequently, I.A.No.2045 of 2005 is also dismissed.

H.L. DATTU,
CHIEF JUSTICE.

K.T. SANKARAN,
JUDGE.

vku/DK.